

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 871 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgment ?
2. To be referred to the Reporter or not ?
3. Whether their Lordships wish to see the fair copy of judgment?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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BACHUBHAI MANGALBHAI

Versus

STATE OF GUJARAT

Appearance:

MR H.R. PRAJAPATI for MR YU MALIK for Petitioner
MR S.R. DIVETIA, APP, for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 11/02/97

ORAL JUDGEMENT

(Per Pandya, J.)

The accused-appellant along with three others was facing charge for the offence punishable under sections 302, 326, 324, 323 all of them individually as also with the aid of 114 jointly.

2 At the end of the trial the Addl. Sessions Judge of Kheda at Nadiad in Sessions Case No.65 of 1988 by his judgement dated 12.9.1988 was pleased to disbelieve the case of section 114 of IPC and therefore proceeded on individually, convicted the accused for different offences. The appellant-accused came to be punished under section 302 of IPC as also under section 324 of the IPC and was awarded RI for life and RI for six months respectively. The substantial sentences were ordered to run concurrently. For all practical purposes therefore the present appeal is in respect of original accused no.1 for being convicted under section 302 of IPC.

3 The incident leading to the case occurred on 2.11.1987 at about 9 PM when all the prosecution witnesses along with deceased were returning from their field after watering it. They had to pass by the house of the accused as the houses of the prosecution witnesses are nearby and in between there is a field.

4 Prior to the date of the incident, trees (babul) standing in the field of the accused was cut and deceased Budha Soma was being suspected for that act by the present accused-appellant.

5 When the accused appellant met the deceased along with two other witnesses verbal clashes ensued with regard to the cutting of the tree and from there it further flared up into physical violence. Accused no.1, the present appellant, had a dharia in his hand and he made use of it for giving blow to the deceased on his left parietal region. With the aid of that instrument he also gave a blow on the left leg of the deceased. His right arm was also injured in the same manner.

6 The injured witness Janabhai Udhabhai, son of the deceased, Exh.11 has given the details as to the incident.

7 However, in the cross-examination of this witness, it has been brought about categorically that both sides had clashed and in the process accused also received injuries. On the side of the prosecution witnesses also dharia was used along with sticks.

8 There is nothing on the record indicating that accused did receive injuries in the said clash. The defence had tried to make out a case of assault having been committed by the prosecution witnesses and thereby an attempt was made to make up it into a case of self-defence. However, in this regard it remains a mere suggestion and coming back to the incident it is quite obvious there was a clash between both the sides in which they received injuries and unfortunately Budha Soma died.

9 It is thus a case falling into section 304-I instead of section 302 where murder is committed without premeditation in the sudden fight in the heat of passion. The injured eye witnesses having admitted that they also retaliated, there is no question of offenders having taken undue advantage or acted in a cruel and unusual manner.

10 As if this is not enough, the said witness also admits that it being night time, as there was darkness around, it was not possible to see who has given what blow with which weapon to whom. It would clearly indicate that there was a free fight and in the process one death was caused and on both sides different persons received injuries with the weapons like dharia and sticks.

11 We therefore accept the submission of the learned advocate Mr Prajapati that this is not a case falling under section 302 of IPC. We also accept his submission that this is a case under section 304-I of IPC. The appeal is partly allowed. The order of conviction and sentence under section 302 of IPC is set aside. In its place the appellant is convicted for the offence under section 304-I of IPC. In place of RI for life, he is awarded 10 years RI. Whatever time that he has spent as an under-trial prisoner or as a convict shall be adjusted in the aforesaid sentence and the balance, if any, shall be undergone by him. Thereafter he shall of course be released, if not required in any other case.

(mohd)